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NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

PETE MARTINEZ-VILLANUEVA and
GEORGE THOMAS CALLAHAN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Pete Martinez-Villaneuva and George Thomas Callahan, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of conviction of narcotics offenses entered against petitioners by the United States District Court for the Central District of California.

OPINION BELOW

The opinion of the Court of Appeals, not yet officially reported, is printed in the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on July 3, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE QUESTION PRESENTED

Whether petitioners were deprived of due process and a fair trial by prejudicial joinder which resulted in a joint trial wherein the Government proved the key elements of the offenses charged by way of extrajudicial statements of the petitioners which were inadmissible hearsay as to the non-declaring party.

STATUTE INVOLVED

Rule 14 - Federal Rules of Criminal Procedure

"Relief from Prejudicial Joinder

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial." As amended

Feb. 28, 1966, eff. July 1, 1966.

STATEMENT OF THE CASE

Petitioners were indicted on January 6, 1971, on six counts charging violations of Title 21, United States Code § 174, and Title 26, United States Code, § 4705(a). All of the counts charged offenses occurring on or about September 10, 1970 (CT 1 through 6).[1]

Petitioners pleaded not guilty to all counts, and the case was tried to a jury, which returned a verdict of guilty on all counts with respect to each petitioner (CT 49-50). On July 6, 1971, each petitioner was sentenced to a total of five years' imprisonment on counts 1 through 6 (CT 95-96).

STATEMENT OF FACTS

On August 24, 1970, Ronald Dodge and a man named Offenbacker were arrested for the sale of heroin. While both federal and state officers participated in that arrest, only state charges were filed against the two men. Shortly thereafter, federal agents made it known to Dodge that if he cooperated with them, by facilitating the arrest of his supplier, they would make his cooperation known to the Los Angeles County District Attorney.

Both Dodge and Offenbacker were released on their own recognizance on the day following their arrests. Both had agreed to help the federal agents (RT 287-288). On

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1. As used herein, CT refers to the Clerk's Transcript and RT to the Reporter's Transcript.

September 10, 1970, Dodge produced a large quantity of amphetamine tablets for federal agents and claimed that he bought them from petitioners Villanueva and Callahan (RT 126). A plan was arranged whereby the informant Dodge would act as a broker for sale of heroin between Agent Shoemaker and petitioners.

Later the same day, Agent Shoemaker, accompanied by the informant Dodge, went to a bowling alley which was located next door to petitioners' apartment house. Shoemaker provided Dodge with $900.00 in government funds as payment for heroin which Dodge was supposed to purchase and to pay the past debt for the amphetamine tablets which Dodge had previously produced.

The informant left the bowling alley and allegedly went to petitioner Villanueva's apartment. Dodge testified that once inside he told Villanueva and Callahan of the prospective buyer who was interested in buying heroin. He further testified that they gave him an ounce of the narcotic wrapped in a rubber contraceptive to take to this buyer as a sample (RT 90). [Petitioners testified that on this occasion all Dodge did was stop by the apartment and request that they accompany him to a bar in order to meet a friend and that there was no discussion about heroin or pills (RT 460).]

Dodge returned to the bowling alley and gave the heroin to Agent Shoemaker. Shortly thereafter, Dodge went back to the apartment and told petitioners that the buyer was ready to make a deal (RT 223). Next, Callahan, Villanueva and Dodge all left the Villanueva apartment and proceeded to the bowling alley (RT 304-308). There, they met with Agent Shoemaker and all four men went across the

street to a small park. It is at this point that Agent Shoemaker testified that the sale of a large quantity of heroin was discussed. Included in the alleged conversation was a reference to the contraband's European origin.

Agent Shoemaker stated that he wanted a kilo per week, and George Callahan allegedly replied that they could supply that amount if they knew it would be a steady order (RT 110). [Petitioners denied that they took part in any such conversation, but that it was Dodge and Shoemaker who did all the talking (RT 461).] Finally, the men got up and left the park together.

Later on the evening of September 10, 1970, Villanueva allegedly called the informant Dodge and stated that he could sell fourteen "pieces" in bulk form (RT 113), and a meeting was arranged at the rear of Villanueva's apartment house (RT 114). Upon arriving at this location, Shoemaker and Dodge noticed a black and white police car, so they drove away; thereafter. Dodge telephoned petitioners again and an alternate meeting was arranged at the Hacienda Apartments in Bell, California (RT 114).

Agent Shoemaker and the informant arrived at the parking lot at this location and were met a few minutes later by Villanueva and Callahan. All four men walked to the rear of the parking lot, and after Villanueva was told that the money was in the trunk of Shoemaker's car, Callahan pointed to a palm tree near the front of his car and said, "it is there" (RT 117, 205).

The informant Dodge then retrieved the package, a paper bag which contained a canister of narcotics (RT 116). Dodge and Shoemaker returned to their car and inspected the contents of the canister. At this point officers

stationed at the scene closed in for the arrest.

Petitioners' explanation for their presence at the Hacienda Apartments was that they had received a call from Dodge requesting that they meet him at their friend Jim's place–meaning Villanueva's friend Jim–who lived in this particular apartment house. This was the sole reason for their presence there on the night of the arrest. They testified that shortly after they met with Dodge and Shoemaker at this location, Dodge picked up something and they were immediately placed under arrest (RT 458, 463).

REASONS FOR GRANTING THE WRIT

The instant case is one in which petitioners were irreparably prejudiced by the introduction into evidence of each other's inculpatory statements.

Critical to the Government's case were the extrajudicial statements made by each petitioner in the presence of the informant Dodge and agents of the Federal Government. Such statements were hearsay as to the other defendant, and their admission operated to prejudice each of their cases in the eyes of the jury and denied them a fair trial.

Examples of such statements from the testimony of the informant Dodge and other Government witnesses are as follows: "Pete told him that the heroin was on the counter . . . and to go ahead and take it" (RT 190); testimony that Callahan said "they could do it if they knew it would be a steady order" (referring to a quantity of heroin) (RT 110); testimony that Villanueva said that he "could sell fourteen pieces in bulk form" (RT 113); and testimony that Callahan asked "how much heroin [Agent Shoemaker] could handle

and what he intended to do with it" (RT 110, line 1).

The total cannot help but result in grave prejudice to single defendants, in that evidence which tends to incriminate only one of the defendants will necessarily be imputed to the other defendant so as to prejudice him with guilt by association. *Bruton v. United States*, 391 U.S. 123 (1968); *Krulewitch v. United States*, 336 U.S. 440 (1949).

The *Bruton* problem can be analyzed as a joinder problem under Rule 14. See, Wright, *Federal Practice and Procedure*, § 224, pages 452-453. The problem elucidated in *Bruton* is therefore a specific example of the general difficulty of prejudice arising through joinder of co-defendants.

Although in this case each of the petitioners took the witness stand, thereby obviating the problem of confrontation and cross-examination, it is, however, submitted that this testimony was compelled in view of the prior admission into evidence of their hearsay statements. The statements were so prejudicial and inculpatory that petitioners dared not allow them to go unrebutted.

Due process of law requires the *Government* to prove each fact essential to a conviction beyond a reasonable doubt based upon competent and *admissible* evidence. See, *In re Winship*, 397 U.S. 358 (1970).

The erroneous admission of highly prejudicial hearsay cannot be cured by a defendant's testimony, since the defense testimony was compelled by the erroneous admission into evidence of the hearsay evidence and the denial of the defense motions for judgments of acquittal. The net effect of these evidentiary and procedural errors was to indirectly violate

the defendants' privilege against self-incrimination and their right to remain silent. *Chapman v. California*, 386 U.S. 18 (1967); *People v. Clark*, 62 Cal. 2d 870 [402 P.2d 856] (1965).

CONCLUSION

For the foregoing reasons, the writ should issue.

Respectfully submitted,

BURTON MARKS of

MARKS, SHERMAN AND SCHWARTZ

Attorney for Petitioners.

APPENDIX

(Opinion of the United States Court of Appeals for the Ninth Circuit.)

APPENDIX

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. PETE MARTINEZ-VILLANUEVA and GEORGE CALLAHAN, Defendants-Appellants.

NO. 71-2133

[July 3, 1972]

Appeal from the United States District Court for the Central District of California

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Before: BROWNING and DUNIWAY, Circuit Judges, and ANDERSON,* District Judge.

PER CURIAM:

Appellants Pete Martinez-Villanueva and George Callahan were convicted, after a jury trial, with having received concealed and sold heroin without first obtaining written order forms from the Secretary of the Treasury in violation of 21 U.S.C.A. § 174 and 26 U.S.C.A. § 4705(a).

Appellants' contentions regarding failure of proof that they had sufficient control over the heroin to support a conviction has been dealt with in *Juvera v. United States,* 378 F.2d 433 (9th Cir. 1967) and the facts as presented in this case meet the dictates of *Juvera.*

The granting of a motion for severance pursuant to Rule 14 of the Federal Rules of Criminal Procedure is a matter within the sound discretion of the trial court and

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*Honorable J. Blaine Anderson, United States District Judge, District of Idaho, sitting by designation.

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will not be overruled by this court without a showing of clear prejudice, which has not been shown to be the case here. *Cortez v. United States,* 405 F.2d 875 (9th Cir. 1968).

The issue of the constitutionality of the Ninth Circuit rule that criminal defendants must admit the elements of a crime in order to avail themselves of the defense of entrapment, *Wright v. United States,* 391 F.2d 542 (9th Cir. 1968), is moot because the trial court gave an entrapment instruction to the jury and did not require appellants to conform to the rule as a condition of asserting the defense nor the giving of the entrapment instruction.

The order of proof at trial is a matter within the sound discretion of the trial court and will not be overturned in the absence of prejudicial error and none has been shown in this case. *Enriquez v. United States,* 293 F.2d 788 (9th Cir. 1961).

Accordingly, it is the opinion of this court that the decision of the trial court should be, and the same hereby is AFFIRMED.

STATE OF CALIFORNIA)
)
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326A Main Street, Huntington Beach, California 92648, that on aug 17 1972, I served the within PETITION FOR WRIT OF CERTIORARI on the following named party by depositing TWO COPIES thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said party at the address as follows:

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
12TH FLOOR
U. S. COURTHOUSE
LOS ANGELES, CALIFORNIA 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed on aug 17, 1972, at HUNTINGTON BEACH, CALIF.

D. A. Standefer

Dean-Standefer, 326A Main St., Huntington Beach, Calif.
(714) 536-7161